IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MUGASHA, J.A., NDIKA, J.A., And SEHEL, J.A.)

CONSOLIDATED CRIMINAL APPEALS NO. 141, 143 & 145 OF 2016 & 391 OF 2018

1. MBARUKU S/O HAMISI.....1ST APPELLANT
2. ELINAZI S/O ELIABU @ MSHANA.....2ND APPELLANT
3. AMRI S/O KIHENYE @ AMRI.....3RD APPELLANT
4. EX.-F. 8302 PC JAMES.....4TH APPELLANT
5. B. 500 SGT JUMA S/O MUSSA.....5TH APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Mbeya)
(Ngwala, J.)

dated the 22nd day of April, 2016
in
DC. Criminal Appeal No. 62 of 2014

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JUDGMENT OF THE COURT

20th & 30th August, 2019

SEHEL, J.A.:

In the Resident Magistrate's court of Mbeya at Mbeya, the appellants were arraigned and convicted of armed robbery contrary to section 287A of the Penal Code, Cap. 16 RE 2002. Upon conviction, they were each sentenced to a term of thirty years imprisonment. Dissatisfied with the conviction and sentence, they unsuccessfully appealed to the High Court.

Thus they filed their separate notices of appeal that led to the filing of the Criminal Appeal No. 141, 142, 143,144 and 145 of 2016. On 17th day of November, 2016, the law firm of Mkumbe and Company, Advocates filed a memorandum of appeal containing eight grounds in respect of the 1st, 2nd, 4th, and 5th appellants. The 3rd respondent filed his separate memorandum of appeal on 21st day of November, 2016. The grounds of appeal in both memoranda were condensed to three main grounds by Mr. Mkumbe in his written submissions that he filed on 6th day of December, 2016. The three grounds were:

1. Improper identification of the appellants;

2. Improper admission of the exhibits; and

3. No weapon was found with the appellants.

On 5th February, 2018 when the consolidated appeals came for hearing, this Court found and held that the notices of appeal filed by the 4th and 5th appellants were defective. Consequently, the Court struck them out and adjourned the hearing of the rest of the consolidated appeals to another date to wait the processing and filing of a fresh appeal by the 4th and 5th appellants. After obtaining leave to file proper notice of appeal, the 4th and 5th appellants instituted Criminal Appeal No. 391 of 2018.

At the hearing of the appeals, Messrs Victor Mkumbe and Shambwe Shitambala appeared for the appellants and Mr. Ofmedy Mtenga, learned State Attorney appeared for the respondent Republic. At the outset Mr. Mkumbe advanced two prayers. First, he prayed for the consolidation of the consolidated appeals no. 141, 143 & 145 of 2016 with the Criminal Appeal No. 391 of 2018. Secondly, he prayed to adopt the memoranda of appeal of the 1st, 2nd, 4th and 5th appellants filed on 17th November, 2016 and the one filed by the 3rd appellant on 21st November, 2016. Mr. Mtenga had no objection to both prayers. On our part, we acceded to the prayers. In that regard, we invoked Rule 69 (2) of the Tanzania Court of Appeal Rules of 2009 and consolidated Criminal Appeals Nos. 141, 143 & 145 of 2016 with Criminal Appeal No. 391 of 2018 to be one appeal.

The present appeal arose from robbery that took place on 3rd day of January, 2014 at Kawetele area within the city and region of Mbeya. It was an account of Ezekia Matalia, PW1 that he was instructed by his boss to transport Pasupuleti Sreethi, PW3 and Morivenkasuppa Narayanapua to Chunya. They started their journey around 15:30 hours. They first passed by Gapco petrol station to fuel the car, then they went to Mwanjelwa to buy two blankets and finally started to go to Chunya.

When they reached at Kawetele which is 25 kilometers away, they saw two motor vehicles on the road. They overtook the first car which was Toyota GX 100 but when they wanted to overtake the other car that had a flat tyre, it was white in colour and parked in the middle of the road, thereby a person appeared and stopped them. Both PW1 and PW3 said it was before sun set at around 17:30 hours. They said they managed to identify the person who stopped them to be the 5th appellant. He was with the 4th appellant.

The 5th appellant asked PW1 if he had any wheel spanner or a jerk, or a screw driver or a pliers and he replied to have none of those items. While PW1 was struggling to pass, the 5th appellant handcuffed PW1, dragged him out of his car, and switched off the engine. Then, the 1st and 4th appellants transferred PW1 to one of their cars whereas the 5th appellant remained with PW3.

Then a car appeared, it was heading to Mbeya from Chunya. The 5th appellant stopped it and asked for a spanner. He was given. While he was changing the flat tyre, PW1 tried to raise an alarm but the 1st appellant threatened him with a machete that he will kill him. After changing the flat tyre, the car from Chunya continued with its journey. The appellants turned around their cars, off loaded the luggage from PW1's car and put them into

their car. They handcuffed PW1 and took PW3 with them. PW1 who had a spare key, ignited his car and started to chase the appellants.

PW3 on his part said he was able to identify the 1st, 3rd, 4th and 5th appellants who were at the scene and that it was the 5th appellant who stopped their car. He said the 5th appellant started asking questions to PW1 that is when PW3 became suspicious thus he called his friend Jamil s/o Ahmad and informed him about the incident. PW3 further stated that after being taken to the appellant's car, he was seated between the 1st and 5th appellants at the back of the driver's seat while the 4th appellant was driving it. The 2nd appellant was driving another car. PW3 was then dropped off after some few meters away where he was picked by PW1. When PW1 and PW3 were pursuing the appellants, they saw two police motor vehicles coming to their way. PW1 flashed light to the police.

PW2 said he received a call from one citizen who reported to him about the robbery at Kawetele. He notified his OCS who instructed him that PW4 should go to the scene.

PW4 said he assembled three armed police officers. D/Cpl Beda who had RT weapon, F. 4204 D/C Hamis, PW6 had swig, and D/C Nasoro who had SMG. He himself took a pistol. They took a civilian motor vehicle and

proceeded to the scene. Before they reached Kawetele they saw two salon cars, in a very high speed then they saw PW1's car. They stopped and asked him about the robbery incident. PW1 informed them that they were the ones who were robbed and they were after the two cars that just passed them. Since, they missed the robbers, PW4 phoned OCD and OCCID requesting for assistance. They turned around and started chasing the appellants. In the pursuit, they managed to getting close to the car driven by the 2nd appellant. So the 2nd appellant stopped the car, disembarked and started to run away. PW6 who was together with PW4 managed to stop the 2nd appellant as he shot him in his leg. They arrested him. PW6 who was together with D/C Nassoro and Cpl. Beda took the 2nd appellant to the police station. They used the 2nd appellant's motor vehicle.

A/Insp Joseph Yohana Masanyika, PW5 a leader of anti-robbery unit, said on that day he received a call from his OCD that some people were robbed at Kawetele Hill. When he was heading to the scene, he was informed that the robbers had left the scene and were heading to his direction thus he put a road block. When the 1st, 3rd, 4th, and 5th appellants reached at the road block, they stopped and were all arrested.

They were taken to the police station. At the police station, A/Superintendent Mtatiro, PW2 conducted an emergency search. He said he

had to do it under section 42 of the Criminal Procedure Act, Cap. 20 RE 2002 (the CPA) because the 2nd appellant was bleeding thus he needed an emergency treatment. During the search, they recovered two blankets (one in red and the other in green colour), two bags, two laptops make Samsung and Acer, phone charger, three mobile phones make Teckno, Nokia and Samsung, and a pair of handcuff. The mobile phone make Teckno was admitted as exhibit P1. The two laptops, two mobile phones (Samsung and Nokia), two bags, phone charger, and a pair of handcuff were collectively admitted as exhibit P2. The two blankets were collectively admitted as exhibit P3.

The 1st and 3rd appellants in their defences alleged that on 3rd January, 2014 they went to Chunya to buy a motor vehicle. On their way back, they hired the 5th appellant's car. At Chalangwa village the 4th appellant stopped his car and embarked on the 5th appellant's car. They continued with their journey until when they came across the road block that is when they were arrested.

The 3rd, 4th and 5th appellants narrated the same story. That on that day, the 4th appellant was at work until 10.00 a.m when he left and went to Mafiati. While he was at Mafiati, he received a call that there was a person

who needed to hire his car. He took that person to Chunya. On his way back to Mbeya he was hired by the 1st and 3rd appellants.

The 5th appellant also said on that day he went to Chalangwa village to mend an electric socket and on his way back to Mbeya he stopped the 5th appellant's car. He paid the 5th appellant TZS 5,000.00 as transport fare.

The 2nd appellant said on that day he was returning to Mbeya from Lupa Tingatinga where he went to sort out family issues. He used his private car. He said on his way back he passed through Chinese construction site camp. Some few meters away he saw a motor vehicle approaching him beaming light to him. So he stopped. Three people disembarked from that car and arrested him.

The trial magistrate was satisfied that the prosecution proved its case beyond reasonable doubt, and accordingly convicted and sentenced the appellants. In upholding the trial court's findings the first appellate court considered the following:

1. The appellants committed the offence in broad daylight;

2. They were found with the complainants' stolen properties; and

3. Their co-appellant was injured by the bullets of the gun.

At the hearing of the appeal, Mr. Mkumbe prayed to adopt the memoranda of appeal and the written submissions. He said in their written submissions, they have condensed the grounds into three issues. For the first issue, he argued the appellants were not adequately identified as robbers who robbed PW1 and PW3 because both witnesses saw the appellants for the first time. It was his opinion that there ought to have been conducted an identification parade. He further contended that the identification done by PW1 and PW5 was nothing more than dock identification which cannot be relied upon by any court. He referred us to the case of **Prosper Baltazar Kileo and Another v. Republic**, Criminal Appeal No. 150 of 2011 (unreported).

On the second issue, he said there was improper admission of exhibits, P1 and P3. He advanced seven reasons as to why he believed that there was improper admission **One,** section 38(1) of the CPA was not complied with because the seizure certificate was not issued by OCS but it was issued by ASP Mtatiro, PW2. **Two,** the search was not made at the scene of the crime but it was done at the central police station Mbeya. This is gathered at pages 35 and 28 when PW3 said OCS supervised the search at the police. **Three,** there was no civilian called to eyewitness the alleged search. **Four**, PW1 and PW3 did not tender any receipt to justify the recovered properties

as theirs since the items recovered were common items. **Five**, the chain of custody was not established on how the items were recovered. **Six**, both PW1 and PW3 did not mention to the police the number plates of the motor-vehicle that robbed them. And **Seven,** even at the trial court, both PW1 and PW3 failed to mention the number plates of the motor vehicle.

On the last issue, Mr. Mkumbe argued that the offence of armed robbery was not proved by the prosecution because the alleged weapon used had not been tendered in court as evidence.

Mr. Shitambala added that the items alleged to have been stolen but not found on the appellants, such as, receipts and TZS 3.5m were not tendered in court. He also said there was no justifiable reason to conduct an emergence search as according to the search warrant the search was conducted at 21:00 hrs, at the central police station.

On armed robbery, he contended that the charge sheet is defective for not citing the proper provision of the law as required by section 135(1) (a) of the CPA.

Mr. Mtenga from the outset informed the court that they support the conviction and sentence of the appellant thus they opposed to the appeal.

Responding on identification, he argued that the incident took place during the evening at around 17:30 hours. thus there was enough light and the witnesses had ample time to observe their attackers. He further contended that the appellants were arrested during the continuous hot pursuit from the scene of the crime thus the issue of mistaken identity could not arise. He referred us to the case of **Joseph Munene and Another v. Republic,** Criminal Appeal No. 109 of 2002 (unreported).

On improper admission of exhibits P1 and P3, he conceded that there was no independent witness but he said nobody came to claim the seized items thus they belonged to PW1 and PW3. In the alternative, he said even if they are expunged still the offence of armed robbery had been established by the clear evidence of PW1, PW3 and the way the appellants were arrested.

Regarding the issue that the charge sheet was defective, he said the non-citation did not prejudice the appellants because the charge was read over to them, the charge itself disclosed the offence, they heard the evidence of the prosecution witnesses, and they defended themselves on the charged offence. Thus, the appellants fully understood the charge leveled against them.

Regarding the evidence of armed robbery, Mr. Mtenga pointed out that the evidence of PW1 established the charged offence because he said the victim was threatened by a machete which is a dangerous weapon. Therefore, he argued, the submission that it should have been tendered as evidence is not merited in any way as long as there is evidence brought to prove the offence. On the strength of the evidence, Mr. Mtenga prayed for the appeal to be dismissed.

In a brief rejoinder, Mr. Shitambala reiterated that there was no incident of armed robbery that was proven.

After careful consideration of the record and the submission of the learned counsel, we wish to point out from the outset that in this second appeal we are guided by a salutary principle of law which we restated in the case of **Omary Lugiko Ndaki v. Republic,** Criminal Appeal No. 544 of 2015 (unreported) that:

> *"Where courts below make concurrent findings of fact, a second appellate court should not interfere unless the findings of the courts below are based on misapprehension of the evidence leading to erroneous conclusions of fact resulting into miscarriage of justice. Where there is any misapprehension of the evidence leadings to wrong*

conclusions, the Court is entitled to interfere, re-assess the evidence and arrive at its own conclusions as deemed appropriate."

We now wish to consider the grounds of appeal. We will start with the issue as to whether the appellants were properly identified. We think this issue should not detain us much because from the evidence of PW1, PW2, PW3, PW4, PW5 and PW6 the appellants were arrested in the course of a hot pursuit. In the case of **Joseph Munene and another v. Republic,** (supra) we were faced with similar scenario, where the appellants in that case were apprehended by the villagers at a boma where they took refuge after the victim raised an alarm of help. We said:

"It was a continuous pursuit from when they robbed PW2 up to when they were apprehended in PW4's boma. It was during day time. There was therefore no question of mistaking the appellants for somebody else. Even PW4 confirmed that it was the appellants who took refuge in his boma while being pursued by PW2, PW3 and others, until the appellants were apprehended thereat."

In this appeal, PW1 and PW3 said they were robbed at around 17:30 hours, the sun at that time had not yet set, it was a broad daylight. They said immediately, after they were robbed by the appellants, they started to

chase the appellants with their car and in that pursuit police officers, PW4, PW5, and PW6 joined the pursuit where they managed to arrest all appellants. Thus, there was a hot pursuit of the appellants from when they robbed PW1 and PW3 up to when they were apprehended by PW4, PW5 and PW6. There was no need of conducting identification parade.

Turning to the complaints of seizure certificate, the lower courts are faulted for acting on exhibits that were not properly seized. It is on the record that the police conducted the search at the central police station. The search warrant appearing at pages 113-114 of the record shows that it was made under section 42 of the CPA and the search was conducted at 21:00hrs. The explanation given by PW2 who conducted the search was that there was an emergency because the 2nd appellant was badly injured. On our part we do not find that explanation, a good cause for non-compliance of the mandatory provision of section 38 (1) of the CPA. We say so because the search was made at the police station where the OCS, OCD and OCCID were present. It is inconceivable to hear such an excuse. The police ought to have complied with section 38(1) of the CPA. Further, as rightly pointed out by Mr. Mkumbe, no independent witness was called to witness the search. There is no explanation given as to why the police failed to call independent

witness. Not only that even upon completion of the search and upon seizure of the stolen items, no receipt was issued.

In the case of **Selemani Abdallah and Others v. Republic,** Criminal Appeal No. 354 of 2008 we emphasised on the importance of the issuance of receipt and signature of the independent witness. We said:

> *"The whole purpose of issuing receipt to the seized items and obtaining signature of the witnesses is to make sure that the property seized come from no place other than the one shown therein. If the procedure is observed or followed, the complaints normally expressed by suspects that evidence arising from such search is fabricated will to a great extent be minimized."*

Since in the matter at hand the procedure in obtaining exhibits P1 and P3 was flawed, we have no hesitation to hold that they were improperly obtained thus improperly acted upon by the lower courts. Consequently we expunge them from the record.

This takes us to the last complaint that is whether the offence of armed robbery was proved. On the available evidence and after having expunged exhibits P1 and P3 we still hold that the offence of armed robbery was proved to the hilt. As rightly submitted by the learned State Attorney,

PW1 and PW3 explained that they were robbed their belongings by the appellants, namely two blankets (green and red), two laptops make Samsung and Accer, three mobile phones make Tecno, Nokia and Samsung, two bags and a charger. PW1 further stated that the appellants threatened him with a machete. It be noted here that the provisions under which the appellants were charged was section 287A of the Penal Code which reads as follows:

> *"Any person who **steals anything and at or immediately after the time of stealing is armed with any dangerous or offensive weapon or robbery instrument**; or is in company of one or more persons, and **at or immediately before or immediately after the time of the stealing uses or threatens to use violence to any person**, commits an offence termed armed robbery" and on conviction is liable to imprisonment for a minimum term of thirty years with or without corporal punishment." [Emphasis supplied]*

An important element of the offence of robbery is the use of force against a victim for purposes of stealing or retaining the property after stealing.

In the case **of Mkiwa Nassoro Ramdhani v. Republic**, Criminal Appeal No. 187 of 2013 (unreported) the Court held that:

> *"We do not hesitate to say that the facts reproduced above disclosed the ingredients of the charged offence. As will be recalled, the appellant and his colleague who braved justice in that he was not arrested, assaulted the complainant with sticks and managed to rob his bicycle. See the case of* ***Muraji Seif v. Republic,*** *Criminal Appeal No. 213 of 2005, CAT, Tanga Registry (unreported). Since the facts are clear they used sticks in accomplishing the robbery; also he did this in the company of that other person who was not arrested, that constituted the offence of armed robbery under section 287A of the said Act. That justifies our conclusion that the facts disclosed the ingredients of the charged offence."*

Guided by the principle of section 278A of the Penal Code, we have scrutinized the charge, and reviewed the evidence, we are satisfied that all ingredients of the offence of armed robbery were disclosed in the charge sheet and proved by the prosecution. As it will be recalled, PW1 said he was threatened by a machete thus the appellants used forced against PW1 before stealing the properties from PW1 and PW3. In that respect, we find

this complaint together with a complaint that the charge sheet was defective to have no merit.

In the end as there was no substance in the appeal, we see no reason to interfere with the concurrent findings of both lower courts of convicting and upholding the conviction of the appellants and on sentencing the appellants to a team of thirty 30 years imprisonment. The appeal is dismissed.

DATED at **MBEYA** this 30th day of August, 2019.

S. E. A. MUGASHA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Judgment delivered this 30th day of August, 2019 in the presence of Ms. Xaveria Makombe and Zena James both learned State Attorneys for the respondent Republic and Mr. Gerald Msegeya holding brief for Mr. Victor Mkumbe, learned advocate for the appellants is hereby certified as a true copy of the original.

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL